

CENTER FOR DISABILITY ACCESS  
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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 **Scott Johnson**

11 Plaintiff,

12 v.

13 **Marco Polo Italian Ice Cream  
14 Inc**, a California Corporation

15 Defendants.

16 **Case No.**

17 **Complaint For Damages And  
Injunctive Relief For Violations  
Of: Americans With Disabilities  
Act; Unruh Civil Rights Act**

18 Plaintiff Scott Johnson complains of Marco Polo Italian Ice Cream Inc,  
a California Corporation; and alleges as follows:

21 **PARTIES:**

22 1. Plaintiff is a California resident with physical disabilities. Plaintiff is a  
23 level C-5 quadriplegic. He cannot walk and also has significant manual  
24 dexterity impairments. He uses a wheelchair for mobility and has a specially  
25 equipped van.

26 2. Defendant Marco Polo Italian Ice Cream Inc owned Marco Polo Italian  
27 Ice Cream located at or about 999 Story Rd, San Jose, California, in November  
28 2020.

1       3. Defendant Marco Polo Italian Ice Cream Inc owns Marco Polo Italian  
2       Ice Cream located at or about 999 Story Rd, San Jose, California, currently.

3       4. Plaintiff does not know the true names of Defendants, their business  
4       capacities, their ownership connection to the property and business, or their  
5       relative responsibilities in causing the access violations herein complained of,  
6       and alleges a joint venture and common enterprise by all such Defendants.  
7       Plaintiff is informed and believes that each of the Defendants herein is  
8       responsible in some capacity for the events herein alleged, or is a necessary  
9       party for obtaining appropriate relief. Plaintiff will seek leave to amend when  
10      the true names, capacities, connections, and responsibilities of the Defendants  
11      are ascertained.

12

13       **JURISDICTION & VENUE:**

14       5. The Court has subject matter jurisdiction over the action pursuant to 28  
15      U.S.C. § 1331 and § 1343(a)(3) & (a)(4) for violations of the Americans with  
16      Disabilities Act of 1990, 42 U.S.C. § 12101, et seq.

17       6. Pursuant to supplemental jurisdiction, an attendant and related cause  
18      of action, arising from the same nucleus of operative facts and arising out of  
19      the same transactions, is also brought under California's Unruh Civil Rights  
20      Act, which act expressly incorporates the Americans with Disabilities Act.

21       7. Venue is proper in this court pursuant to 28 U.S.C. § 1331(b) and is  
22      founded on the fact that the real property which is the subject of this action is  
23      located in this district and that Plaintiff's cause of action arose in this district.

24

25       **FACTUAL ALLEGATIONS:**

26       8. Plaintiff went to Marco Polo Italian Ice Cream in November 2020 with  
27      the intention to avail himself of its goods or services motivated in part to  
28      determine if the defendants comply with the disability access laws. Not only

1 did Plaintiff personally encounter the unlawful barriers in November 2020, he  
2 wanted to return and patronize the business but was specifically deterred due  
3 to his actual personal knowledge of the barriers gleaned from his encounter  
4 with them.

5 9. Marco Polo Italian Ice Cream is a facility open to the public, a place of  
6 public accommodation, and a business establishment.

7 10. Unfortunately, on the date of the plaintiff's visit, the defendants failed  
8 to provide wheelchair accessible dining surfaces in conformance with the ADA  
9 Standards as it relates to wheelchair users like the plaintiff.

10 11. Marco Polo Italian Ice Cream provides dining surfaces to its customers  
11 but fails to provide wheelchair accessible dining surfaces.

12 12. One problem that plaintiff encountered is the lack of sufficient knee or  
13 toe clearance under the outside dining surfaces for wheelchair users.

14 13. Plaintiff believes that there are other features of the dining surfaces that  
15 likely fail to comply with the ADA Standards and seeks to have fully compliant  
16 dining surfaces available for wheelchair users.

17 14. On information and belief the defendants currently fail to provide  
18 wheelchair accessible dining surfaces.

19 15. These barriers relate to and impact the plaintiff's disability. Plaintiff  
20 personally encountered these barriers.

21 16. As a wheelchair user, the plaintiff benefits from and is entitled to use  
22 wheelchair accessible facilities. By failing to provide accessible facilities, the  
23 defendants denied the plaintiff full and equal access.

24 17. The failure to provide accessible facilities created difficulty and  
25 discomfort for the Plaintiff.

26 18. The defendants have failed to maintain in working and useable  
27 conditions those features required to provide ready access to persons with  
28 disabilities.

1       19. The barriers identified above are easily removed without much  
2 difficulty or expense. They are the types of barriers identified by the  
3 Department of Justice as presumably readily achievable to remove and, in fact,  
4 these barriers are readily achievable to remove. Moreover, there are numerous  
5 alternative accommodations that could be made to provide a greater level of  
6 access if complete removal were not achievable.

7       20. Plaintiff will return to Marco Polo Italian Ice Cream to avail himself of  
8 its goods or services and to determine compliance with the disability access  
9 laws once it is represented to him that Marco Polo Italian Ice Cream and its  
10 facilities are accessible. Plaintiff is currently deterred from doing so because  
11 of his knowledge of the existing barriers and his uncertainty about the  
12 existence of yet other barriers on the site. If the barriers are not removed, the  
13 plaintiff will face unlawful and discriminatory barriers again.

14       21. Given the obvious and blatant nature of the barriers and violations  
15 alleged herein, the plaintiff alleges, on information and belief, that there are  
16 other violations and barriers on the site that relate to his disability. Plaintiff will  
17 amend the complaint, to provide proper notice regarding the scope of this  
18 lawsuit, once he conducts a site inspection. However, please be on notice that  
19 the plaintiff seeks to have all barriers related to his disability remedied. See  
20 *Doran v. 7-11*, 524 F.3d 1034 (9th Cir. 2008) (holding that once a plaintiff  
21 encounters one barrier at a site, he can sue to have all barriers that relate to his  
22 disability removed regardless of whether he personally encountered them).

23

24 **I. FIRST CAUSE OF ACTION: VIOLATION OF THE AMERICANS  
25 WITH DISABILITIES ACT OF 1990** (On behalf of Plaintiff and against all  
26 Defendants.) (42 U.S.C. section 12101, et seq.)

27       22. Plaintiff re-pleads and incorporates by reference, as if fully set forth  
28 again herein, the allegations contained in all prior paragraphs of this

1 complaint.

2       23. Under the ADA, it is an act of discrimination to fail to ensure that the  
3       privileges, advantages, accommodations, facilities, goods and services of any  
4       place of public accommodation is offered on a full and equal basis by anyone  
5       who owns, leases, or operates a place of public accommodation. See 42 U.S.C.  
6       § 12182(a). Discrimination is defined, *inter alia*, as follows:

- 7           a. A failure to make reasonable modifications in policies, practices,  
8           or procedures, when such modifications are necessary to afford  
9           goods, services, facilities, privileges, advantages, or  
10          accommodations to individuals with disabilities, unless the  
11          accommodation would work a fundamental alteration of those  
12          services and facilities. 42 U.S.C. § 12182(b)(2)(A)(ii).
- 13           b. A failure to remove architectural barriers where such removal is  
14          readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). Barriers are  
15          defined by reference to the ADA Standards.
- 16           c. A failure to make alterations in such a manner that, to the  
17          maximum extent feasible, the altered portions of the facility are  
18          readily accessible to and usable by individuals with disabilities,  
19          including individuals who use wheelchairs or to ensure that, to the  
20          maximum extent feasible, the path of travel to the altered area and  
21          the bathrooms, telephones, and drinking fountains serving the  
22          altered area, are readily accessible to and usable by individuals  
23          with disabilities. 42 U.S.C. § 12183(a)(2).

24       24. When a business provides facilities such as dining surfaces, it must  
25          provide accessible dining surfaces.

26       25. Here, accessible dining surfaces have not been provided in  
27          conformance with the ADA Standards.

28       26. The Safe Harbor provisions of the 2010 Standards are not applicable

1 here because the conditions challenged in this lawsuit do not comply with the  
2 1991 Standards.

3 27. A public accommodation must maintain in operable working condition  
4 those features of its facilities and equipment that are required to be readily  
5 accessible to and usable by persons with disabilities. 28 C.F.R. § 36.211(a).

6 28. Here, the failure to ensure that the accessible facilities were available  
7 and ready to be used by the plaintiff is a violation of the law.

8

9 **II. SECOND CAUSE OF ACTION: VIOLATION OF THE UNRUH CIVIL**  
10 **RIGHTS ACT** (On behalf of Plaintiff and against all Defendants.) (Cal. Civ.  
11 Code § 51-53.)

12 29. Plaintiff repleads and incorporates by reference, as if fully set forth  
13 again herein, the allegations contained in all prior paragraphs of this  
14 complaint. The Unruh Civil Rights Act (“Unruh Act”) guarantees, inter alia,  
15 that persons with disabilities are entitled to full and equal accommodations,  
16 advantages, facilities, privileges, or services in all business establishment of  
17 every kind whatsoever within the jurisdiction of the State of California. Cal.  
18 Civ. Code § 51(b).

19 30. The Unruh Act provides that a violation of the ADA is a violation of the  
20 Unruh Act. Cal. Civ. Code, § 51(f).

21 31. Defendants’ acts and omissions, as herein alleged, have violated the  
22 Unruh Act by, inter alia, denying, or aiding, or inciting the denial of, Plaintiff’s  
23 rights to full and equal use of the accommodations, advantages, facilities,  
24 privileges, or services offered.

25 32. Because the violation of the Unruh Civil Rights Act resulted in difficulty,  
26 discomfort or embarrassment for the plaintiff, the defendants are also each  
27 responsible for statutory damages, i.e., a civil penalty. (Civ. Code § 55.56(a)-  
28 (c).)

1       33. Although the plaintiff encountered frustration and difficulty by facing  
2 discriminatory barriers, even manifesting itself with minor and fleeting  
3 physical symptoms, the plaintiff does not value this very modest physical  
4 personal injury greater than the amount of the statutory damages.

5

6       **PRAYER:**

7       Wherefore, Plaintiff prays that this Court award damages and provide  
8 relief as follows:

9       1. For injunctive relief, compelling Defendants to comply with the  
10 Americans with Disabilities Act and the Unruh Civil Rights Act. Note: the  
11 plaintiff is not invoking section 55 of the California Civil Code and is not  
12 seeking injunctive relief under the Disabled Persons Act at all.

13       2. For equitable nominal damages for violation of the ADA. See  
14 *Uzuegbunam v. Preczewski*, --- U.S. ---, 2021 WL 850106 (U.S. Mar. 8, 2021).

15       3. Damages under the Unruh Civil Rights Act, which provides for actual  
16 damages and a statutory minimum of \$4,000 for each offense.

17       4. Reasonable attorney fees, litigation expenses and costs of suit, pursuant  
18 to 42 U.S.C. § 12205; and Cal. Civ. Code §§ 52.

19

20 Dated: March 11, 2021

CENTER FOR DISABILITY ACCESS

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22 By: \_\_\_\_\_

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24   
Amanda Seabock, Esq.  
Attorney for plaintiff